the moment I have no views at all as to the merits. In view of the terms of the will, which is the trust instrument in this case, in the absence of fraud it would not appear that the plaintiffs would have any redress once the transaction had gone through; as the whole matter can be brought to trial shortly, I consider that the satisfactory course is to continue the caveat until the matter, which is one of very great importance, can be disposed of at the hearing.

Costs in cause.

Order accordingly.

[REVISIONAL CRIMINAL JURISDICTION]
POYSER, C.J.
April 10, 1939.

PUBLIC PROSECUTOR v. V. MUKAYAN.

[SEPANG CRIMINAL CASE No. 646 of 1939]

Road Traffic Enactment, 1937, S. 12 (3)—Using a private car as a "goods vehicle."

The accused in this case was charged at the Magistrate's Court, Sepang on the 28th December, 1939, with using a private car to carry goods to wit toddy, thereby committing a breach of the condition of his licence, an offence under section 12 (3) of the Road Traffic Enactment, 1937. He pleaded guilty to the charge and was convicted and fined $5/- and costs.

On reference by the Public Prosecutor, Federated Malay States, to the Chief Justice, Federated Malay States.

Held, that in view of the definition of 'goods vehicle' in section 2 of the Road Traffic Enactment, 1937 and in the Motor Vehicles (Registration and Licensing) Rules, 1937 the car in question was not adapted for use as a goods vehicle, and therefore no offence had been committed.

Poyser, C.J.—This case was brought to my notice by the Public Prosecutor. The accused was charged with, and pleaded guilty to, the following offence:—

> "That you at 2.45 p.m. on 28.11.39 in front of Police Station, Sungei Pelek, being the driver of motor car No. S.L. 3508 licensed as a private car did use the vehicle to carry goods to wit toddy and thereby you have committed a breach of the condition of your licence, an offence under section 12 (3) Enactment No. 17/39."

No evidence was recorded, but the following facts appear from a report by the Transport Board.

The motor vehicle S.L. 3508 is an ordinary private car licensed as such. It has in no way been adapted for the carriage of goods, but the owner was in the habit of using it for carrying toddy to various estates. A goods vehicle is defined in the Road Traffic Enactment (section 2) as:—.

> "A motor vehicle constructed or adapted for the carriage of goods or a trailor so constructed or adapted."

There is a further definition in the Motor Vehicles (Registration and Licensing) Rules, viz:—

> "The expression 'goods vehicles' means motor vehicles (including motor cycles weighing more than eight hundred-weight unladen) constructed or adapted for use and used for the haulage or conveyance of goods or burden of any description whether in the course of trade or otherwise."

This car S.L. 3508 does not come within either of these definitions and, therefore, I do not see how the owner could properly be convicted of using his car as a 'goods vehicle' under section 12 (3) of the Enactment, nor did he commit an offence against the provisions of section 82, viz: using a goods vehicle for the carriage of goods without a carrier licence.

The car in question was not adapted for use as a goods vehicle, and therefore no offence was committed.

Acting in revision, therefore, I set aside the conviction, and the fine which has been paid will be refunded to the accused.

Conviction quashed.

[ORIGINAL CIVIL JURISDICTION]
CUSSEN, J.
October 16, 1939.

HENDRIK CHRISTIAAN VAN HOOGSTRATEN
v.
LOW LUM SENG.

[SELANGOR CIVIL SUIT No. 27 of 1939]

Alien enemy—fatal accidents—deceased an alien enemy—claim for damages for loss of expectation of life—suit by administrator—whether maintainable.

The plaintiff as the administrator of the estate of a deceased German national sued the defendant for damages for loss of expectation of life as a result of fatal injuries received by the deceased in a collision between the deceased's car and the defendant's motor lorry. The suit was commenced in March, 1939, placed in the fixing List of 15th July, and fixed for hearing on the 19th September 1939. On the 11th of September 1939, after the outbreak of war, the defence was amended by the addition of a paragraph alleging that the plaintiff was an enemy alien and/or sued on behalf of enemy aliens.

Held, that the Federated Malay States were at war with Germany and therefore the general rule of law that an enemy alien cannot sue as a plaintiff in English Courts applied but that as the action was properly and validly instituted and proceeded so to the commencement of the war it should be stayed during the continuance of hostilities, and not dismissed.

Cases referred to:—

(1) *Alcinous v. Nigreu,* 119 E.R. 84.

(2) *Antoine v. Morsheed,* 128 E.R. 1025.

(3) *Anonymous Case,* 74 E.R. 889.

(4) *Anonymous Case,* 78 E.R. 399.

(5) *Brocks v. Phillips,* 78 E.R. 920.

(6) *Caroon's Case,* 79 E.R. 612.

(7) *Chamberlain's Settlements, In re,* (1921) 2 Chan. 533 at p. 548.

(8) *Flindt v. Waters,* 104 E.R. 842.

(9) *Flint v. Lowell,* (1935) 1 K.B. 354.

(10) *In re Gandig & Blum—Spalding v. Lodde,* 31 T.L.R. 153.

(11) *Hix v. Harrison,* 81 E.R. 177.

(12) *"The Hoop"* 165 E.R. 146 at p. 148.

(13) *The Ionian Ships,* 164 E.R. 394.

(14) *Janson v. Driefontein Mines Ltd.,* (1902) A.C. 484 at pp. 498—499.

(15) *Le Bret v. Papillon,* 102 E.R. 842.

(16) *In re Mary, Duchess of Sutherland,* 31 T.L.R. 248.

(17) *Maxwell v. Grunhut,* 31 T.L.R. 79 at p. 80.

(17a) *M'Connell v. Hector,* 3 B. at P. 113.

(18) *Morgan v. Scoulding,* (1938) 1 K.B. 786.

(19) *Porter v. Freudenberg,* (1915) 1 K.B. 857.

(20) *Princess Thum & Taxis v. Moffitt,* (1915) 1 Ch. 58.

(21) *Richefield v. Udal,* 124 E.R. 909 at pp. 911.

(22) *Rodrigues v. Speyer Bros.,* (1919) A.C. 59 at pp. 64—68, 90, 94 & 95.

(23) *Rose v. Ford* (1937) A.C. 126 at p. 133.

(24) *Schaffenius v. Goldberg,* (1916) 1 K.B. 284.

(25) *Societe Anonyme Belge des Mines D'Alqustrel v. Anglo-Belgian Agency Ltd.,* (1915) 2 Ch. 409 at pp. 413—4.

(26) *In re Stahlwark Beckers Patent,* (1917) 2 Ch. 272, at pp. 273 & 275.

(27) *"Sylvester's Case,"* 87 E.R. 1157.

(28) *Villa v. Dimock,* 90 E.R. 164.

(29) *Watford v. Masham,* 72 E.R. 672.

(30) *In re Wilson: Wilson v. Wilson,* 84 L.J. 1893.

TRIAL OF SUIT.

Charlesworth, for Plaintiff.

Hastings, for Defendant.

[*Note:*—Before the hearing started the Legal Adviser addressed the Court and asked that if any point were raised as to whether or not the Federated Malay States were at war it should not be decided unless:—

either (1) the Legal Adviser were heard as *amicus curiae,* or

(2) the Court of its own motion referred for information to the Government, or

(3) the Government were joined as a party for the purpose only of arguing that point, the Legal Adviser claiming a right in the Government to be joined when any question of a Treaty is raised or any question of public importance.

He cited *In re Chamberlain's Settlements*[7] and also pointed out that if the suit succeeded and damages were payable to the Estate, estate duty would be payable to the Federated Malay States and, indeed, all proceeds which might result from these proceedings had already been assigned to the Collector of Estate Duty. The collector of Estate Duty might therefore also wish to be heard.

Also that the whole question of suits in Court for the benefit of enemy subjects and the disposal of any proceeds was under the consideration of Government and possibly legislation on the matter might shortly be brought into force. The Judge intimated to the Legal Adviser that he thought the question as to whether or not the Federated Malay States were at War was free from any doubt: in the circumstances the Legal Adviser did not press his application.]

Charlesworth for the Plaintiff. Plaint amended by consent by adding claim for funeral expenses amounting to $258/-.

No claim is made for pain and suffering or under Chapter 19. A claim under Chapter 19 is for certain named persons not for the estate. The claim is for damages for loss of expectation of life.

Flint v. Lowell[9] and *Rose v. Ford*[23] Sec. 1 Law Reform (Miscellaneous Provisions) Act 1934 p. 335 (the cause of action survives), provisions of which Act were imported into our law by Enactment 3 of 1937. Enactment 3 of 1937, Sec. 4. *Morgan v. Scoulding*[18].

In answer to the amended Defence that Plaintiff is an alien enemy or sues on behalf of an alien enemy, I say:—

(1) the State of Selangor or the Federated Malay States are not at war with Germany. If no

state of war exist then no German is an alien enemy at Common Law.

(2) the Rule of Law in England is based upon the principle that the Courts in England are the Courts of the King and that the King will not permit his Courts to be used for the assistance of subjects of Sovereigns with whom he is at War. The Courts are the Courts of the Federated Malay States—they are not the Courts of the King and I doubt if they are the Courts of the Rulers.

(3) Even if a state of war does not exist between the Sovereign of the State and Germany, still applying the principles of English Common Law the Plaintiff is not an alien enemy as defined by the English Common Law.

The definition of an alien enemy in English Common Law does not depend on the nationality but upon the place where he ordinarily resides. So an English subject ordinarily resident in Germany in a state of war would be an "alien enemy" whereas a man of German nationality ordinarily residing in England during a state of war would not be regarded as an "alien enemy." That applies also to subjects of the enemy Sovereigns who ordinarily reside in allied or neutral countries.

(4) Even if the Plaintiff is an alien enemy or is coloured by the enemy alienage of his principal, still as Administrator of the Estate of a deceased person suing on a cause of action vested in the deceased whose estate he represents, he would, even in English Common Law, be permitted to continue his action by the English Courts, because he sues *"per autre droit"*—he does not sue for himself but represents the deceased man.

Such an action has been allowed to continue in England—an action by an Administrator in such circumstances is an exception to any absolute rule there may be.

(5) There is no absolute rule and where it is more in the interests of the State in which a Suit is brought and the subjects thereof that the Suit of an Enemy alien should be allowed to continue it will be permitted to continue.

The Government of the Federated Malay States are interested from the point of view of Estate Duty. The Insurers of deceased's motor car are interested in the result of this suit because they have already paid for the loss of the car and hope to be reimbursed if suit succeeds. The Administrator is a creditor for expenses incurred by him in the administration of the Estate. There may be other creditors.

Hastings for the defendant submits:—

I have four propositions:—

(1) No suit can be maintained by any person who is an alien enemy during the continuance of a state of war.

(2) An alien enemy is a subject of a state at War with the King who is not within the realm with the leave and licence of the Crown, and also a British Subject who is resident of his own volition in the enemy territory.

(3) The suit must be dismissed and not stayed.

(4) That this country is in a state of war with Germany. I deal first with No. (4).

The mere fact that the Suzerain of a Protected State is at war with another state is not of itself, *ipso facto,* sufficient to render the Protected State at war with the enemy of the Suzerain State. It is a question of fact whether the Suzerain State has in fact manifested its intention to place the Protected State in a state of war.

The only case I have proved is the case of *"The Ionian Ships"*[11].

(Both I and Mr. Charlesworth are agreed that this is a question for the Court to determine on evidence) puts in Gazette No. 19 of 4.9.39 and No. 19 of 5.9.39 —Exhibits D1 and D2.

A country must be either neutral or at War. The Suzerain Power has the power to declare war on behalf of the neutral state and by this Gazette Notification the Suzerain Power has declared war on behalf of these Protected States.

He cited in support of these other propositions, Sec. 2 of Enactment 3 of 1937. *Halsbury (Hailsham)* Vol. 1 p. 30, para. 32. *Pollock* on Torts 13th Edition page 56. *Maxwell v. Grunhut,*[17]. *In re Gandig & Blum—Spalding v. Lodde"*[10]. *In re Wilson. Wilson v. Wilson*[30]. *Princess Thum & Taxis v. Moffitt,*[20]. *Societe Anonyme Belge des Mines D'Alqustrel v.*

Anglo-Belgian Agency Ltd.,[25]. *In re Stahlwark Beckers Patent,*[26]. *Rodrigues v. Speyer Bros.,*[22]. *"The Hoop",*[12]. *Porter v. Freudenberg,*[19] non-suit —suit to be dismissed and p. 873. *Sylvester's Case,*[27]. *Le Bret v. Papillon,*[15]. *Flindt v. Waters,*[8]. *Antoine v. Morsheed,*[2]. *Alcinous v. Nigreu*[1]. "Judgment for Defendant." *Janson v. Driefontein Mines Ltd.,*[14] right of action is suspended.

If the suit is once brought and the Plaintiff is before the Court the Plaintiff must be non-suited or the suit dismissed judgment must be given against him. A stay is not the proper order.

Page 3 of *Byrne's* Legal Dictionary "Plea of abatement"—?

Page 268 of 9th Volume of *Holdsworth's* History of English Law.

Position of Administrator. *Rodrigues v. Speyer Bros.*[22].

No advantage to the enemy alien means no advantage in law—it made no difference that the Custodian of Enemy Property may step in and seize the proceeds.

Even applying the principle of "Speyer" to this case it is clear that the whole benefit of this case will pass to the enemy—the fact that the alien enemy owes money to British Subjects does not enable him to sue. *"Rodrigues v. Speyer"*[22] was the case where the greater number of the Plaintiffs were British subjects and had their own right to sue—the alien enemy Speyer had a small share only as a partner.

Charlesworth for plaintiff.

My first point (1) Country at War?

Only question is whether the acts of the State of Selangor are hostile acts placing the State at War with Germany. Conceded that fact that Great Britain at war does not necessarily place the State of Selangor at War.

I concede that Great Britain does control the foreign relations of the State of Selangor and so has the power to place the State at War.

"The Ionian Ships" case[13].

If Great Britain intended to place the State of Selangor at war it must have made a Formal Declaration of War or through its Adviser the British Resident, advised the Sovereign of the State of Selangor to declare war.

There must be either a Formal Proclamation by Great Britain on behalf of the State or by a Declaration by the Sovereign of the State itself made on the advice of his British Resident.

Is the State at War by reason of acts of hostility? There have been no acts of direct hostility by this State. By hostility is meant actual fighting—real hostility. *Halsbury (Hailsham)* Vol. 6 p. 523 para. 648.

Present-day position between Poland and Russia—there is no legal state of war between Poland and Russia—there is authority from Russian Government but not from the Polish Government.

Hostilities mean armed hostilities—the use of force.

Do any of the Acts of the Federated Malay States amount to hostilities?

There has been no use of armed force either by the Federated Malay States or by Germany.

D 2—Reg. 2 "Trading with the enemy." "Enemy within the meaning of these regulations."

Regulation 3 defines "enemy."

Does "dealing with enemy" constitute an act of hostility to Germany?

These Regulations are no more than regulations for the protection of the interest of the Suzerain Power.

The Suzerian Power protects the States and is entitled to call upon them to help her by not trading with the enemy but by doing so she does not place these States in a state of war.

Mobilisation is not an act of hostility—merely an act of preparation for possible eventualities.

There must be actual hostilities if there is no Formal Declaration of War—we are concerned with a legal State of War.

If the Suzerain Power wished to place their States at war it could clearly and unequivocally do so by a plain Declaration of War. *Halsbury (Hailsham)* Vol. 11, p. 149 para. 267.

I agree now that the Declaration or Proclamation must be by the High Commissioner, not by the Ruler. Suzerain Power controls external relations and advise on internal relations.

My third point:

Is Plaintiff an alien enemy?

Porter v. Freudenberg[19]. Headnote definition of "alien enemy" *In re Mary, Duchess of Sutherland,*[16].

The Plaintiff represents and is speaking in the person of the (Hoogstraten) deceased man himself.

It is the deceased's Suit that the Administrator is prosecuting by virtue of the Civil Law Enactment (Sec. 4) it is not the claims of the dependants under the Executors (Powers) and Fatal Accidents Enactment.

The material Plaintiff in this Suit is the Administrator of Deceased's estate.

Assuming there is an absolute rule that the Suit of an enemy alien is stayed, if the enemy alien is suing as administrator or executor, then in such a capacity he is excepted from the rule, because as an executor he is not suing in any personal capacity but "*per autre droit*" on a cause of action of the deceased man. The deceased man's cause of action is not coloured by the enemy alienage of the material Plaintiff (i.e. in this case the father).

Distinction between claim under the Executors (Powers) and Fatal Accidents Enactment, (Chapter 19) and this claim for loss of expectation of life which is the claim which vested in the deceased before his death.

Chapter 19, Sec. 4.

Civil Law Enactment Sec. 4.

Only Administrator can bring it and the benefit belongs to the estate of the deceased. A claim under Chapter 19 Sec. 4 might be liable to be stayed in this case but not this Suit. This is the action of a man who never was an enemy alien and cannot be one. The proceeds of this Suit cannot be enemy property in themselves but after administration of the deceased's estate it may be that a portion of the estate will become payable to an enemy alien.

The deceased's estate is not enemy property. If after administration of the estate monies will become due to an enemy alien such money during the War must be paid to the Custodian of Enemy Property.

No enemy alien has any right to any share in this money until after administration of the Estate.

It has always been an exception to any rule against the continuance of a Suit by an alien enemy that an alien enemy executor or administrator may sue.

The cases are:—

(1) *Anonymous Case,*[3].
(2) *Anonymous Case*[4]. (These are the two cases (earliest) against me.)
(3) *Caroon's Case*[6].
(4) *Brocks v. Phillips*[5].
(5) *Richefield v. Udal.,*[21].
(6) *Villa v. Dimock,*[28].
(7) *Hix v. Harrison,*[11].

In case of *Rodrigues v. Speyer Bros.*[22] there is some doubt thrown on the exception of the Executor but it was not really in issue in that case.

See p. 61, & p. 63; p. 70, p. 84, p. 89—90, p. 92, p. 118—19 and p. 137.

I say an executor is an exception because he sues "*per autre droit.*"

The Official Administrator or a creditor might take out Letters of Administration if the father or other next-of-kin did not.

Rodriguez v. Speyer[22] pp. 66, 67, 68.

Compare right of a beneficiary of estate with that of a partner (vide p. 68).

Page 75 (2nd line).

Page 82 (bottom) and Page 83; 86—87.

If Court thought it desirable the Court could direct the Custodian to be joined, but he is aware of this Suit. He has been asked if he wants to join and he has said he does not want to.

I think he is right because he has no interest until after the administration of the estate and only then if there is any surplus.

It depends upon the amount of damages awarded whether there will be a surplus for beneficiaries or not.

Schaffenius v. Goldberg[24].

Registered alien—licence.

What would have been the position of deceased if he had lived and had been interned.

Deceased died as an "*alien ami*"—a friend.

This cause of action is an action for the benefit of the Estate and is not affected or coloured in any way by the character of his Representative in contrast

to a claim under Chapter 19 which is directly for the benefit of the Dependants i.e. the Father.

Page 68 *Rodriguez v. Speyer,*[22].

Hastings in reply.

Schaffenius v. Goldberg,[24].

Custodian of Enemy Property has no power to sue.

(1) Country at War.

> The Suzerain Power is the only authority who can place a Protected State at war. It is a question of fact if the Suzerain has declared or manifested its intention to do so.

Act of Hostility? It is not necessary to fire a gun or send a party of soldiers.

I rely on the Proclamation from Gazette of 4th September.

Article 3 of Proclamation and Article 5—"enemy nationals."

Cannot be a state when the F.M.S. is neither at war nor neutral—a neutral cannot help one belligerent i.e. Trading with the Enemy Regulations—the state created now in the F.M.S. is not neutrality.

Halsbury (Hailsham) Volume 1 p. 477 of the definition and "alien enemy."

As to the question of an administrator:—

Rodriguez v. Speyer,[22] at p. 116.

"Reference to *Watford v. Masham*"[29].

Caroon's Case,[6] no question of an enemy alien.

Rodriguez v. Speyer[22] p. 84—reference to *Brocks v. Phillips*[5].

Only case where it is clear, I think, both the Administrator and deceased were enemy aliens is *Villa v. Dimock*[28].

No ground for the proposition that it makes a difference that the monies will go to the Custodian. That does not affect the application of the principles —if it did it would have provided a perfect answer to the point raised in all the Cases cited both in *Rodriguez v. Speyer*[22] and all the earlier cases.

If the proposition is correct the whole Rule goes.

Cur. Adv. Vult.

Cussen, J.—This is a Suit by the Administrator of the estate of one Ferdinand Volker, deceased, late of Singapore.

On 30th September, 1938, Ferdinand Volker in a collision between his motor-car and the Defendant's lorry about 7 miles from Kuala Lumpur received injuries from which he died shortly after.

In this Suit the Plaintiff claims damages in the sum of $86,392.50 of which $85,000/- is damages for loss of expectation of life.

This Suit was commenced in March 1939 by the filing of the Plaint herein.

The Statement of Defence was filed in April 1939 and the Suit was placed in the Fixing List of 15th July, 1939; and was fixed for hearing on 19th September.

An amended Statement of Defence was filed on 11th September, the amendment consisting in the addition of the following paragraph:—

> "5. The plaintiff is an enemy alien and/or sues on behalf of enemy aliens."

It was agreed that the issue or issues raised by this amendment should be tried and decided first.

I accordingly heard the arguments of Counsel on this subject.

The evidence of the Administrator was first taken to form the necessary basis of fact for argument.

The Administrator is a Dutch subject residing in Singapore—he obtained administration as the Attorney of the father of the deceased, who is a German subject living in Germany. Deceased was also a German national.

The issues now before me are:—

(a) Are the Federated Malay States at war with Germany.
(b) If so, can the Plaintiff maintain and continue this Suit.
(c) If he cannot, should the Suit be stayed or dismissed.

To consider the first question.

In what way can it come about that a Protected State, such as are the Federated Malay States, is in a state of War with Germany?

This depends upon the relation of the Suzerain or Protecting Power to the Protected State.

The only authority cited is the case of "*The Ionian Ships*"[13].

The head-note of that case reads:—

> "The status of the Ionian Islands and their relation to Great Britain are regulated exclusively by the Treaty of Paris of November 5, 1815. That constitutes them a free and independent State, under the exclusive protection of Great Britain. The protecting Sovereign has the right of making peace or War for them. But the intention to place them in a state of war must be clearly expressed as they do not become so **ex necessitate** from Great Britain being at War. Great Britain has not declared war for them against Russia. Their trade therefore with Russia is not illegal because they are neither British subjects, nor allies in the war, nor enemies of Russia."

Revelvant passages of the Judgment are as follows:—

> "The second article is of great importance—the declaration that the State shall be placed under the immediate and exclusive protection of the King of Great Britain. I am strongly inclined to think that the necessary and inevitable consequences of such a condition is that the King of Great Britain has the right of making war or peace; indeed such a power is inseparable from protection; for, how could the duty of protection be fulfilled without such a right."
>
> "No act whatsoever of the Ionian Government or of the protecting Power has brought them within the fair meaning of that term (allies in the War) ....I am of opinion that it does not follow of necessity that the Ionian subjects are at once by a declaration of war by the Crown of Great Britain comprised within that declaration. That being so I know of no act of the protecting Power to place the Ionians in that position."
>
> "I have not been told....that Great Britain has done any act whatsoever to place the Ionian States in hostility with Russia."

Of the proclamation by the Ionian Government, for general information, that Great Britain had declared war on Russia the Judgment comments:—

> "It was such a proclamation as a neutral Government might have made."

Accepting these general propositions as applying to the present case, the question becomes:—

Has the Protecting Power, Great Britain, either by express declaration or by unequivocal acts placed the States of the Federated Malay States at war with Germany?

Article 1 of the Treaty of Federation of 1895 reads:—

> "1. In confirmation of various previous Agreements the Sultan of Perak, the Sultan of Selangor, the Sultan of Pahang, and the Chiefs of the States which form the territory known as the Negri-Sembilan hereby severally place themselves and their States under the protection of the British Government." (Maxwell's Treaties and Engagements p. 70).

Certain pronouncements in the judgment of Sir Wilfred Greene M.R. in the Court of Appeal in England in the recent case of *Kawasaki Kisen Kabushiki Kaisha v. Bantham Steamship Co., Ltd.*, may, I think, be of use to quote. The other 2 members of the Court did not deliver separate judgments but expressed their entire agreement with the judgment of the Master of the Rolls:—

> It is perfectly manifest, to take a simple case, that if in any particular litigation a question arises whether or not this country is at war with another country that is a matter of which the Courts of this country will take judicial notice, and if the Courts find themselves unable from their own knowledge to take that notice, the source of information to which they must address themselves is one, and one only, namely, the Executive Government whose function it is to make war or not to make war and whose decision as to whether a state of war exists or not concludes the matter."

In view of certain arguments put forward by Counsel for the Plaintiff as to the meaning of being at "war" I quote this further passage from the judgment:—

> "His second point was this (referring to Counsel for the Appellants). He said, with regard to the phrase 'if war breaks out involving Japan' that the word 'war' has not a loose or popular meaning but a technical meaning and that technical meaning, he said, is to be found in the principles of international law. Where those principles of international law for this purpose are to be found, I must confess I remain in complete doubt, since the only source of those principles suggested to us was the writings of various writers on international law. It is to be observed, as indeed it was to be expected, that those writers do not speak with one voice, and it is possible to extract from their pages definitions of 'war' which not only differ from one another, but which are inconsistent with one another in important respects. I asked for any authority in which, for the purpose of the municipal law of this country 'war' is in any way defined. No such authority could be suggested .....
> But to say that English law recognises some technical and ascertainable description of what is meant by 'war' appears to me to be a quite impossible proposition. If the English Courts had endeavoured in ancient days to lay down such a definition no doubt one of the things which in those days they would have regarded as essential to 'war' was a declaration of war. Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war. Similarly the recent events in the world have introduced new methods and a new technique with regard to which I conceive that writers on international law will dispute for many years to come. I do not propose to be the first to lay down a definition of 'war' in a so-called technical sense."

Seeing that the Suzerain or protecting Power has, and alone has, the power to place the protected State at war or peace, it is clear I must examine the acts of the Protecting Power, and if such examination does not clearly answer the question then the source of information to which I must address myself is to the Executive Government where lies the power to make war or not to make war and in the present instance that means

the British Government whose Representative is the High Commissioner.

Up to the beginning of September there is no doubt that these States were at peace with Germany. What has happened since then to place these States at war with Germany.

War is a fact of a public nature and so, as provided by section 37 of the Evidence Enactment I turn to the various notifications of the Government of these States appearing in the Gazette.

The evidence to decide this question is to be found in the various Gazette Notifications published on and after 2nd September last. There is first Notification No. 4359 of 2nd September—the "Emergency Regulations 1939." I do not propose to set out my examination of these Regulations but I might point to the definitions of "allied power", "enemy alien", "the War", and "War offence."

Next there is Gazette Notification No. 4368 of 4th September—the Proclamation by the High Commissioner for the Malay States notifiying that a state of war exists between Great Britain and Germany; referring to the measures required for the defence of Malaya, persons subject to military law, and enjoining scrupulous courtesy to all enemy nationals.

Then there is Gazette Notification No. 4387 of 5th September—the "Trading with the Enemy Regulations 1939."

Lastly there is Gazette Notification No. 4401 of 7th September—the Declaration under Section 123 of the Malay Regiment Enactment. In that the High Commissioner declares that:—

> "by reason of the imminence of active service it is necessary for the public service that the Regiment should be temporarily subject to the Enactment as if it was on active service."

There we have a *declaration* by the High Commissioner *that active service is imminent.*

Section 123 (1) defines "on active service" as follows:—

> "the expression 'on active service' as applied to a person subject to military law means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country."

These acts of the High Commissioner, which are the acts of the Suzerain or Protecting Power, are clear and unequivocal; they place the Federated Malay States at war with Germany.

It follows therefore that all German nationals are alien enemies.

The determination of the second issue, i.e. can the Plaintiff maintain and continue this Suit, depends, by virtue of Section 2 of the Civil Law Enactment 1937, on the application of the common law of England as it was at the commencement of that Enactment.

The question becomes:—what would be the position and fate of this present Suit if it were an action in an English Court.

The case law on this subject has, I think, been fully placed before me by Counsel.

[His Lordship then proceeded to enumerate the cases referred to in Counsel's arguments set out above.]

The case of *Rodriguez v. Speyer* is of course authoritative for what it decides. It is the latest decision of the House of Lords.

From an examination of these Cases the common law of England appears to be as follows:—

The general rule of the law is that an enemy alien cannot sue as a Plaintiff in the English Courts though he may be sued as a Defendant, and as such is entitled to defend himself.

But that the rule is not rigid and inflexible was decided by the majority of the Court in *Rodriguez v. Speyer*[22]. It was held that it does not apply to an action in which, for the purpose of winding up the affairs of a partnership dissolved on the outbreak of war by reason of one of the partners having become an alien enemy, the latter is joined as a co-plaintiff.

But the facts of this case were very particular and so regarded by the Court. The enemy alien partner (one of six partners) had a very small interest in the firm (2½% of the net profits) and was indebted to the firm in a large sum.

The following passages from the majority Judgments will sufficiently illustrate the reason and scope of the decision in this case.

From the Judgment of Lord Finlay L.C. *passim:*—

> "There is no doubt that, as a general rule, an alien enemy cannot bring an action in the King's Court as plaintiff, though he may of course be made a defendant. The rule seems to have had its origin in two considerations. Firstly that the subject of a country then at war with the King is in this country, unless he be here with the King's permission, **exlex**, and that he cannot come into the King's courts to sue any more than could an outlaw; and secondly that the King's Courts will give no assistance to proceedings which, if successful, lead to the enrichments of an alien enemy, and therefore would tend

to provide his country with the sinews of war. The rule is founded on public policy..... If however there may be a state of circumstances in which to prevent an alien enemy from being a party to an action as plaintiff would do much more harm to British subjects or to friendly neutrals than to the enemy, this is a consideration most material to be taken into account in determining whether such a case falls within the true scope and extent of the rule."

"The question is whether the rule applies so as to prevent British subjects during the war from recovering a debt which had been contracted in their favour jointly with one who has since become an enemy."

"It would, I think, have been open to the five partners who are not enemies to bring the action in their own names as plaintiffs, joining **Eduard Beit von Speyer** as a defendant."

"No rule against suits by enemy aliens could prevent his being joined as defendant with the results I have described; and to say that under such circumstances he could not be made a co-plaintiff would be to convert a rule of public policy into a mere technicality of procedure. The truth is that the rule was one directed against alien enemies and not against British subjects or friendly neutrals."

"It would indeed be utterly unreasonable that the law should be that the debt could be got in by making the alien enemy a co-defendant but that he could not be a co-plaintiff."

"To hold that the doctrine of disability applies to a case in which an enemy alien cannot during the war reap any benefit from the action and where the action is really for the benefit of the other partners would, I think, involve a misconception of the principle and extent of the rule."

The Judgment distinguishes the case of *M'Connell v. Hector*[17a] as "the majority of the firm consisted of alien enemies and the action was being prosecuted by them." *Per* Viscount Haldane:—

"Or is the rule one of what is called public policy, which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy."

"My Lords while I think that the preponderance of authority down to this date has tended to this treatment of the rule as a rule of ordinary law and not as a mere case of applying policy the Courts have been, as I have shown, by no means unanimous and I do not think that the course of subsequent decision has materially affected this conclusion..... My Lords under these circumstances I am of opinion that it is open to us, as a supreme tribunal unfettered by any decision of its own, to look at the reason of the rule invoked. If we can do this I agree with the majority in the Court of Appeal that it is premature to stop the action at this stage from proceeding."

Per Lord Parmoor:—

"I accept the general principle that a single enemy alien plaintiff cannot sue on his own behalf during the continuance of war."

"My Lords I think it is sufficiently clear that there is no inflexible rule of law founded on public policy which under all circumstances prevents an enemy alien from having any **locus standi in judicio** as co-plaintiff, and that the attempt to enforce such a rule would in the present case not eventuate in any disadvantage to the enemy country, but in the depriving British subjects of rights which on other grounds they unquestionably possess...."

"....the distinction between making the enemy alien a plaintiff or defendant is in some cases little more than one of form. I cannot see that there is any ground on public policy for depriving British subjects of their right of access to the Courts and preventing the enforcement of their claims however small may be the possible contingent interest of an alien enemy who was in partnership with them prior to the outbreak of the war and to whom no payment can be made as long as the war lasts."

"My Lords I think it is open to this House to consider whether the rule of law against the right of access to the Courts by enemy aliens is so inflexible as to prevent access by British subjects when, in order to properly constitute their action, it is necessary that a former partner, who is an enemy alien, should be joined either as co-plaintiff or defendant."

"In my opinion there is no absolute rule of law which prohibits the use of the name of an alien enemy who has been a partner with British subjects prior to the outbreak of war when it is necessary to enforce the payment of debts to which persons had become liable in lawful transactions, when the real object is either to meet the claims of British creditors or to protect the interests of the British partners."

"It is not necessary in the present case to say more than that in the liquidation of a partnership the English partners in whom is vested a power to bring actions should not be disentitled by the rule of procedure that it is necessary to join an enemy alien as a party in order that the action may be properly constituted."

Now I think it is quite clear that the facts of the present case are altogether dissimilar to those of *Rodriguez v. Speyer;* nor do I see any place for the application of the principle on which that case was decided.

I will deal later with the argument as to the position of an Administrator under the rule. In viewing this case in the light of the principle laid down in *Rodriguez v. Speyer* I will treat it as a Suit by an enemy alien Plaintiff. The sole Plaintiff is an enemy alien suing in his own right. There is no question of the right of access to the Court of any British subjects, or Malay, or friendly neutral to bring an action.

It is not a case where the substantial right is that of subjects or neutrals and, owing to a fractional negligible interest of an enemy alien, it is necessary to add him as a Plaintiff as a mere matter of procedure in order to properly constitute the suit. The cause of action is solely that of an enemy alien.

Nor is it the case that claims of British, Malay, or neutral creditors of the deceased will absorb any substantial proportion of the fruits of a judgment in favour of the Plaintiff. The only tangible evidence of anything of that nature is that the Insurance Company which has paid the Plaintiff's estate's claim for $1,000/- in respect of the car would be re-imbursed that amount.

The claim is for $86,392/-. It is quite evident that if the Plaintiff succeeded in this Suit, although he might not be awarded that amount he will almost certainly be awarded a sum which would leave a substantial amount, far in excess of $1,000/- in the estate of the deceased.

So in my opinion the decision in *Rodriguez v. Speyer* does not avail the Plaintiff to take this Suit out of the general Rule.

The argument that any monies left in the estate would have to be paid over to the Custodian of enemy property and so could not, during the continuance of war, reach any enemy aliens, is not by itself sufficient to save the Plaintiff's Suit; for if that were so it seems to me that the like argument must apply to all Suits by enemy aliens and the effect must be the total abrogation of the Rule.

I will now consider the argument that there is another exception to the general rule of the Common Law, i.e. that the rule does not apply to the case of an alien enemy administrator, because he sues *per autre droit.*

The first question is—is there any such exception clearly established and recognised.

The question is incidentally referred to in the judgment in *Rodriguez v. Speyer.* Lord Finlay remarks:—

> "For the present purpose it is enough to say that I agree with the opinion expressed by the very learned author of **Williams** on Executors in the edition of the work published in 1832 (in a note at pages 114 & 115) that the weight of authority is not in favour of the view that an alien enemy executor is unable to sue."

Lord Haldane says:—

> "Indeed as early as the time of Queen Elizabeth in **'Brocks v. Phillips'** the enemy administrator of one who was presumably a subject of the Crown was allowed to sue....But the decisions of this period are certainly not consistent."

Per Lord Atkinson:—

> "An alien enemy is presumably disqualified from suing in any action in any of our Courts of law with the doubtful exception of cases where he sues as executor or administrator."

Lord Sumner remarks:—

> "As to this right the decisions before 1870 were certainly in conflict and the text-writers, on the whole, were adverse to it.... So too, Williams on Executors left the point quite undecided in his text from 1832 to 1873 and the note, so much relied on, if critically examined, is not exact in its treatment of the cases and expresses only a guarded doubt."

Lord Parmoor says:—

> "It appears that there are precedents both in favour of and against the right of enemy aliens who are executors to sue as plaintiffs."

The question of the existence of this exception is then undecided. I cannot accept it as established.

And even if it was established that such an exception exists it must be noted it would apply only to an alien enemy who is the executor of the Estate of one who is either a subject or an **alien ami**—and not an alien enemy—the *autre droit* in which he sues cannot be that of an alien enemy.

In the 5th Edition (1932) of *Dicey's* Conflict of Laws (edited by A. Berriedale Keith) at page 907 I find a foot-note:—

> "It is suggested that an alien enemy, who is an executor or administrator may sue in his representative capacity."

In this case the Administrator is the legal personal representative of the deceased. If the deceased had survived and brought this Suit he would be an alien enemy and could not maintain the Suit. His personal representative stands in his place and I cannot see how he can have any greater or other right than the deceased would have had himself.

I come therefore to the conclusion that the Plaintiff cannot proceed with this Suit.

There remains the question whether this Suit should be stayed or dismissed.

In cases heard in the English Courts during the Great War (1914–1918) in some cases the actions were dismissed and in some cases stayed—vide *Halsbury (Hailsham Edition)* Vol. 1 p. 30 note (N).

In the old pleadings the plea was one of abatement.

In *Rodriguez v. Speyer* Lord Atkinson in his judgment remarks (p. 103):—

> "And while the objection is not now taken by plea on abatement but by summons to stay proceedings."

I am of opinion that in a case like the present one where the Suit was properly and validly instituted and proceeded so to the commencement of war that the proper order to make is one staying the suit during the continuance of the war with Germany.

I accordingly make that order.

Suit stayed.